

States, through Board of Control of Concordia Seminary." (Church Ex. 1, Att. 2 (emphasis added)). In an Order dated March 2, 1938, the Commission noted that KFUA(AM) was located on the grounds of Concordia Seminary and that the station's operation was under the control of a radio committee of ten members, four of whom were members of the faculty or Board of Control of Concordia Seminary. The Commission further observed that a sub-committee known as the KFUA Committee was in direct control of operations. (Church Ex. 1, Att. 4, p. 5). The close association between the Stations and the Seminary was further described by the Commission in its Order in remarks that: (a) the talent used by KFUA(AM) was drawn almost entirely from the membership of the Church, the faculty and student body of Concordia Seminary, and prominent ministers; and (b) the nationally known Concordia Seminary chorus was one of the two major sources of talent for KFUA. (Church Ex. 1, Att. 4, pp. 6-7).<sup>4/</sup>

28. The Seminary has permitted KFUA (and later KFUA-FM) to remain on its campus on a rent-free basis. (Church Ex. 1, pp. 4-5). In addition, the Stations have obtained a supply of individuals with both Lutheran training and a personal conviction to the ministry of the Stations. Such individuals have been willing to work for the relatively low salaries that these Church

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<sup>4/</sup> It should be noted that the Church also applied for and received a license for a UHF television station in 1948. Although the facility was not constructed, the application highlighted the fact that the station was located on the Seminary grounds and that KFUA was broadcasting the devotional services of the Seminary on a regular basis. (Church Ex. 1, p. 7 n.1).

Stations have been able to pay. (Church Ex. 7, p. 6; see also Church Ex. 4, p. 6; Tr. 487).<sup>5/</sup> KFUE(AM) and KFUE-FM have also been utilized for a work/study program for Seminary students in the use of radio as a medium in the Church's mission and ministry. (Church Ex. 1, p. 8; Church Ex. 3, p. 4; Church Ex. 4, p. 23; Tr. 784; see also Tr. 852-53; M.M. Bur. Ex. 24, p. 9 (1987 management report stressing role of Stations in providing training opportunities for future pastors)).

29. The history of the relationship between KFUE and the Seminary is exemplified by a May 1, 1928 issue of The Gospel Voice, a station publication, describing how the musical talent of the Seminary had banded together into an organization which adopted the name "The Concordia Broadcasters." The express purpose of this group was to render regular services over KFUE(AM). In addition, the Concordia Seminary Publicity Committee cooperated with the station in bringing KFUE radio activities before the public; members of the 1928 Postgraduate Class gave brief religious addresses over KFUE every Thursday afternoon at 3:00 p.m.; and members of the Concordia Seminary

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<sup>5/</sup> During the License Term, Concordia Seminary students and their spouses held 21 part-time positions and 8 full-time positions. Of the part-time positions, 17 were AM announcers who needed religious training. (Church Ex. 4, pp. 3-4). All but one of the part-time Seminary students were hired for on-air jobs. (Church Ex. 4, Att. 6; Tr. 506-07). The part-time workers generally worked only 6-12 hours a week. (Church Ex. 3, p. 4; Church Ex. 4, pp. 22-23). Seven of the eight full-time hires were seminary wives -- one full-time hire was a Seminary student. (Church Ex. 4, Att. 6). In the Fall quarter of 1989, there were at least ten minority students at the Seminary, out of a total enrollment of 482. (NAACP Ex. 30).

Mission Society assisted KFUD in the work connected with the Bible class. (Church Ex. 1, pp. 4-5; Church Ex. 1, Att. 3).

30. A June 1942 edition of The Bond stressed that KFUD "serves as a radio laboratory for the students, where they may acquire valuable radio experience which they can later employ in the local stations of their communities." (Church Ex. 1, p. 7; Church Ex. 1, Att. 5). A September 1957 issue of the Church's the Lutheran Witness remarked that "[t]he Radio Student Training project, sponsored jointly by Concordia Seminary and the station, gives specialized instruction in radio and television to theological students." (Church Ex. 1, p. 8; Church Ex. 1, Att. 6). A May 1967 edition of The Gospel Voice stated that Seminary graduates "were reminded of the importance of radio in their total ministry to the needs of the people in their community." During the 1970's and into the 1980's, courses and workshops developed and taught by KFUD staff were offered by the Seminary to its students. (Church Ex. 1, p. 8; Church Ex. 1, Att. 7).

31. Throughout this relationship, including during the License Term, the Stations received letters in which Seminary students (and other Church members) expressed their desire to work at the Stations as an extension of their ministries. (See, e.g., Church Ex. 4, Att. 2). Even Seminary students or their spouses who lacked on-air skills offered their services. For example, Steven J. Benko offered the Stations his skills in data processing. Mr. Benko's letter to the Stations stated that the financial constraints of being a husband and father of four had forced him out of his part-time study for the ministry. He

sought employment with the Stations to enable him to maintain his connection to the Church and perhaps to return to his study of the Church's theology. Such dedication to the Stations' mission has proven vital to the Church's continued operation of the Stations. (Church Ex. 4, p. 4).

32. In the Church's opinion, the Seminary students' work for the Stations has been a part of their overall education as ministers. (Church Ex. 7, p. 6; see also Tr. 852-53). For example, Reverend Paul Devantier, while a Seminary student, served as a part-time AM Announcer at KFUD. After graduating, Reverend Devantier became the Stations' Director of Development, served as General Manager, and eventually became the Church's Executive Director of the BCS, which oversees the Stations for the Church. (Church Ex. 4, pp. 4-5; see supra ¶¶ 23-24). Similar considerations apply in the Church's view to the spouses of Seminary students who are employed at the Stations. The Church believes that these individuals often play an important role as partners in their spouse's ministry after graduation, and that spouses have had the opportunity to learn and develop in that role as Station employees. (Church Ex. 7, p. 6).

33. The general nature of the arrangement between the Stations and Concordia Seminary was summarized by Reverend Dr. Bohlmann, who was president of Concordia Seminary from 1974 to 1981 and then President of the Church during the License Term (Church Ex. 1, p. 1):

[T]he nature of that arrangement perhaps is not a matter of written record. . . . [T]he seminary has a campus of 72 acres and the stations have a beautiful

building on that campus. The students, the faculty members live on the campus for the most part over the years and [the], quote, arrangement, to use your words, has developed from the very beginning of the station. The seminary moved to that campus at about the time the station went into operation in the mid '20's. . . . [It is] part of the campus family and part of a campus community. It's assumed by . . . those who manage the station's affairs and those who serve at the seminary that students, student wives in some cases, will be employed by the station whenever opportunities for employment present themselves. So, yes, if that qualifies as an arrangement. It did not need to become a legally binding document and, and to my knowledge there, there is no such document in the history of the seminary and the station, but a kind of word of mouth, a moral commitment to do that was self-understood, I believe, both at the station and at the seminary. And then in my capacity as president, I assume my predecessors did the same thing. Regular visits with station personnel and, and terms of various arrangements, for example the daily worship of the seminary is broadcast on the stations and so there was consultation from time to time as to how that might be enhanced, but employment practices, too. We were very, very happy that the station, over the years, employed many of our students, and that was an arrangement of sorts.

(Tr. 288 line 6 - 289 line 9).<sup>5/</sup>

##### 5. The Church's Policy of Non-Discrimination

34. Reverend Dr. Ralph A. Bohlmann, President of the Church during the License Term, testified that in his view the Church's whole reason for being has been to proclaim the Word of God, nurture its members, meet the needs of people, and welcome into

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<sup>5/</sup> The arrangement between Concordia Seminary and the Stations was not reduced to writing and may not have been legally enforceable. In crafting pleadings she filed on behalf of the Church, Marcia Cranberg, an attorney with the law firm of Arnold & Porter, which represented the Stations, testified that she did not intend to imply that there was a written, legally enforceable contract and had no intention of misleading the Commission into believing that such a formal contract existed. (Church Ex. 8, p. 8 n.3).

its fold men and women of every race, color and national origin. According to Reverend Dr. Bohlmann, the Church has always wanted its membership to grow, and for all of its ministries (broadcasting being one of the most important) to include all qualified persons without regard to race, color or national origin. (Church Ex. 1, pp. 1-2). In the view of Reverend Bryant Clancy, Director of the Church's Commission on Black Ministry and an African-American, the 117-year history of the Church's work with African-Americans demonstrates an aggressive attitude against racism and continuous outreach toward African-American families. (Church Ex. 2, pp. 1-2).

35. In 1953, the Church formed the Lutheran Human Relations Association of America for the purpose of making efforts to eliminate any segregation and discrimination. To further the presence of African-Americans in the Church, the African-American Mission Models Task Force was created in 1975. In 1977, the Church created the "Commission on Black Ministry," which is designed to expand the Church's African-American membership. (Church Ex. 2, p. 3). In 1981, the Church's Synod in Convention passed Resolution 8-07, resolving "[t]hat we reaffirm our earlier statements against racism and violence and call upon our congregations to reaffirm clearly their affirmation of human life and dignity for all persons and all races." (Church Ex. 7, p. 8; Church Ex. 7, Att. 2). In 1986, the Church publicly denounced apartheid as well as other forms of racial discrimination. (Church Ex. 7, p. 8; Church Ex. 7, Att. 3).

36. The Church has approximately 50,000 African-Americans and a total membership of 2.6 million. Approximately 86 African-American Lutherans serve as pastors of congregations and 30 serve as college or seminary faculty and administrative staff members. (Church Ex. 2, p. 1).

37. The national Church leadership has included an African-American Vice President of the Synod for the past twenty years. African-Americans have also served as Vice Presidents of regional districts, area circuit counselors and members of various district Boards of Directors. (Church Ex. 2, pp. 1-2). The climate in the Church for Reverend Bryant Clancy's efforts on behalf of African-Americans has been very supportive. (Tr. 724).

38. There is strong minority representation at the primary and secondary schools operated by the Church. The minority population of the Church's 1,079 early childhood centers, 988 elementary schools, and 62 high schools consists of seventeen percent minorities, seven percent of whom are African-American. (Church Ex. 2, pp. 2-3).

39. The Church has a long history of providing educational opportunities for minorities. For example, in 1888, Walther College, a Lutheran high school in St. Louis, was perhaps the first school in the city to make an effort to break down segregation by admitting an African-American female student. She later graduated with honors. Currently, 17.9 percent of the students at the twelve campuses of Missouri Synod colleges,

universities and seminaries are minorities and more than half of these are African-American. (Church Ex. 2, p. 2).<sup>2/</sup>

**B. EQUAL EMPLOYMENT OPPORTUNITY AT KFUD**

**1. Non-Discrimination and Affirmative Action at the Stations**

40. Throughout the License Term, the Stations' personnel policies required employment on a racially non-discriminatory basis. The Stations' personnel policies in effect from 1983 to 1986-1987 stated:

It is the policy of this Station, as set forth by the Board of Directors, to provide employment . . . without regard to race, color, religion, national origin, sex or age, except where religious affiliation is a bona fide occupational requirement.

The Stations' personnel policies also contained a commitment "to take affirmative actions to seek out individuals whose potential has not been developed, with the objective of assisting them to meet . . . standards" at a level consistent with healthy growth. (Church Ex. 4, p. 5; Church Ex. 4, Att. 3).

41. The personnel policies in effect at the Stations beginning in 1986-1987, which were distributed to station

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<sup>2/</sup> The colleges and universities are: (1) Concordia College (Ann Arbor, MI); (2) Concordia Lutheran College of Texas (Austin, TX); (3) Concordia College (Bronxville, NY); (4) Christ College Irvine (Irvine, CA); (5) Concordia University Wisconsin (Mequon, WI); (6) Concordia College (Portland, OR); (7) Concordia University (River Forest, IL); (8) Concordia College (St. Paul, MN); (9) Concordia College (Selma, AL); and (10) Concordia Teachers College (Seward, NE). The seminaries are: (11) Concordia Seminary (Clayton, MO); and (12) Concordia Theological Seminary (Fort Wayne, IN). (Church Ex. 2, p. 2).



employees, included a commitment to equal opportunity. The policies recognized two basic concepts, non-discrimination and affirmative action, while acknowledging that for certain positions the Church needed to seek out "individuals with specific religious training." The EEO policy stated:

The recognition of non-discrimination demands the elimination of all prohibited discriminatory conditions, whether purposeful or inadvertent. The Lutheran Church-Missouri Synod is pledged to the careful and systematic examination of all its employment policies to be certain that such policies do not operate to the detriment of any individual on the grounds of race, color, religion, sex, or national origin.

Our commitment to Affirmative Action prompts us to do more than ensure neutrality with regard to race, color, religion, sex, or national origin. The Synod is pledged to programs which place special emphasis on our efforts to recruit, employ, and promote qualified members of all such groups.

(Church Ex. 4, pp. 5-6; Church Ex. 4, Att. 4).

42. The Stations' adherence to this policy of non-discrimination in hiring is evidenced by the fact that no past or then present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion during the License Term. (Church Ex. 7, p. 10).

43. Both the NAACP and the Mass Media Bureau were given full access to the Stations' hiring and payroll records, but neither introduced any evidence that any employee of the Stations, or any job applicant at the Stations, had alleged that he or she had been the victim of discrimination. Neither party produced any evidence of discrimination against any employee or

applicant on grounds of race or religion, or any evidence of any potential applicant who was ever discouraged from applying because of his or her race or religion.

44. Dennis Stortz, Operations Manager for both Stations from 1978 to 1991 and also Acting General Manager for both Stations from July 1986 to May 1987, testified that based on his observation and involvement in the personnel activities of the Stations, he believed the Stations never discriminated against anyone because of his or her race during the License Term. Indeed, it was so clear to Mr. Stortz that the Stations did not discriminate that the suggestion that they might have done so was completely foreign, incomprehensible and hurtful to him. (Church Ex. 4, pp. 1-2). Mr. Stortz believed that the Church's theology taught and encouraged "all persons to achieve their fullest individual potential in the life in God." Establishing barriers to that achievement by discriminating on the basis of race would have been contrary to those teachings as Mr. Stortz understood them, as well as to Mr. Stortz's personal beliefs. (Church Ex. 4, p. 2).

45. Thomas M. Lauher, general manager of KFUD-FM from May 1987 until July 1989, testified that he had never seen any overt or intentional discrimination on the part of anyone associated with either KFUD(AM) or KFUD-FM. (Church Ex. 6, p. 3).

46. Reverend Paul Devantier, the "CEO" of the Stations, believed that the Stations did not discriminate based on (a) his view that the operational supervisors were responsible people of

good character; and (b) the absence of any complaints of discrimination. (Church Ex. 7, pp. 9-10).

47. Reverend Dr. Ralph A. Bohlmann, President of the Church during the License Term, testified that he had known both Paul Devantier and Dennis Stortz for many years, and that they are honest and are individuals of the highest integrity who would never discriminate. (Church Ex. 1, p. 8). On cross-examination by the NAACP's attorney, Reverend Dr. Bohlmann explained the basis of his beliefs about Reverend Devantier and Mr. Stortz:

[A] president of a large organization like the church body has to depend to a large extent on the character and demonstrated commitments, theological in this case as well as technical and professional, in choosing that particular person for that position. So the character and the quality of leadership that one can expect is, to a large extent, determined by . . . the personal integrity and honesty and commitments of the designees. Paul Devantier, for example, was my student many years ago. When I was the president of the seminary, he was the manager . . . at the station with whom I consulted several times. And subsequently during my administration as the president of the church body, he served throughout most of that period as . . . the church body's chief executive in the entire area of communications, covering all of its . . . districts, 30-some districts, its colleges, seminaries, its various entities. I knew him both personally and professionally as a man . . . of deep commitment to the church's own policies of nondiscrimination. In his own family life, pardon me, Paul, for saying this, his commitment is demonstrated by the fact that two of the members of his own household are bi-racial children, one adopted, one a foster child. The kind of commitment he has toward fair and just hiring practices and all other dimensions of the church's posture is demonstrable, and in my position and helping the board to choose its chief executive, questions of honesty, character, and the like are very important. And . . . then . . . [with] . . . Dennis Stortz, and the kinds of individuals that Paul [Devantier] would select as administrators of . . . the stations, would be directly influenced by his own posture.

(Tr. 278 line 21 - 279 line 25). Reverend Dr. Bohlmann also testified that he was briefed frequently by Reverend Devantier as well as by legal counsel and assured himself that the Stations were complying with EEO requirements. (Tr. 283-85).

48. Reverend Bryant Clancy, himself an African-American and Director of the Church's Commission on Black Ministry, testified that based on his experience in the Church, his opinion was that the Church would not discriminate on the basis of race in any of its ministries including the radio ministry, although he did not know the specifics as to how the Stations did their hiring during the License Term. (Church Ex. 2, p. 3; Tr. 719-20). Reverend Clancy has been a guest on KFUD radio programs to inform the listeners of the goals and activities of the Commission on Black Ministry. In his contact with the Stations, he has not been aware of any instance of racial discrimination. (Church Ex. 2, p. 3). Reverend Clancy also vouched for Reverend Devantier's character, testifying that he had known Paul Devantier for years and that Reverend Devantier "is a man of outstanding integrity, fairness and service to the Church and all of God's children." (Church Ex. 2, p. 3).

## **2. Knowledge of Lutheran Doctrine as a Job Requirement**

49. The Church believed during the License Term (and continues to believe) that many of the positions at KFUD(AM), as well as positions that served functions at both of the Stations, required a knowledge of Lutheran doctrine and philosophies. For example, in the Church's judgment the Station Manager of KFUD(AM)

needed to be familiar with the mission and doctrine of the Church because part of the manager's job was to ensure that the station presented Lutheran doctrine accurately. Indeed, in Dennis Stortz's judgment, there was simply no substitute for faith in the Church's teachings as a qualification for this task. In the Church's view, the Director of Development and Assistant Director of Development also needed to understand the ministry of KFUD and its relation to doctrine and to the Bible because these people created the AM station's fund raising letters and generally did fundraising. Indeed, it was the Church's judgment that it was desirable that a Lutheran pastor hold the Director of Development position. (Church Ex. 4, p. 7; Tr. 871-72).

50. The Church's judgment was (and is) that it was also essential to have knowledge of Lutheran doctrine to be an announcer of religious programming on KFUD(AM). Virtually all announcers on the AM station did worship events, religious discussion programs or call-ins. (Tr. 871). Again, the Church believed there was no substitute for knowledge of Lutheran doctrine for selecting and presenting program materials and for responding to caller inquiries.<sup>8/</sup> The Director of Audio Resources (title changed to Manager of Religious Programming in 1988) also needed substantial knowledge of the Lutheran mission and doctrine in the Church's judgment. This person was

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<sup>8/</sup> Almost all of the Seminary students hired during the License Term filled positions as part-time announcers of religious programs on KFUD(AM), which positions required knowledge of Lutheran doctrine in the Church's judgment. (Church Ex. 4, pp. 8-9; Church Ex. 4, Att. 6; see also Tr. 506-07; see supra Note 5).

responsible for managing the broadcasts of live worship service on KFUD(AM) from area Lutheran congregations, for producing that station's Christian music programs, for arranging for daily worship programs produced by that station, and for creating other worship program features produced and broadcast by KFUD(AM). (Church Ex. 4, pp. 7-8).

51. The Church's judgment was (and is) that it was desirable to be an active member of a Lutheran Church-Missouri Synod congregation for many jobs which it believed had a connection to its program and mission. For example, Church membership and resulting knowledge about the Church calendar and Church related-events was considered desirable for any receptionist (who would have worked for and served both of the Stations) because the receptionist interacted with religious listeners and potential donors, and sometimes scheduled people who were going to be on the air. (Tr. 494-98; see Church Ex. 4, p. 3 (positions in management, the business department, engineering as well as secretarial, clerical and receptionist positions, served both KFUD(AM) and KFUD-FM); Tr. 618-19 (same); see also NAACP Ex. 39, pp. 1-2 (position qualifications for secretary-receptionist); NAACP Ex. 39, pp. 7-8 (position description for receptionist requiring membership in a Church congregation)).

52. It was also helpful in the Church's view for certain secretaries to be familiar with the Lutheran Church because part of their job was to contact pastors to enlist volunteers for "Share-A-Thons." (Church Ex. 4, p. 7). Mr. Stortz explained

that in his view it was more effective to have Lutherans solicit donations in connection with fundraising. (Tr. 500). Moreover, the secretaries in question gathered and conveyed information to pastors about the matters which the pastors would need to address on weekly religious programs. (Tr. 735). These secretaries also sometimes made decisions as to which pastor to schedule for a specific week. (Tr. 735-36).

53. Because of the need for knowledge of Lutheran principles for many positions, including the examples discussed above, KFUD(AM) in particular frequently placed employment advertising in Lutheran periodicals such as the Lutheran Witness. This newspaper was widely distributed to members of Church congregations, including its African-American members. (Church Ex. 4, p. 12; see also Church Ex. 4, Att. 6, pp. 4, 5, 7; Tr. 750-51).

54. In reviewing and preparing the Equal Employment Opportunity Program Report in the Stations' 1989 license renewal applications, Dennis Stortz did not believe that he needed to state explicitly that the Stations required knowledge of Church doctrine for certain positions. (Church Ex. 4, p. 18). A sentence in the Report stated that: "When vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants." (Church Ex. 4, p. 17; Church Ex. 4, Att. 16, p. 7). Mr. Stortz believed that this sentence was consistent with the use of various employment criteria to find "qualified" applicants. (Church Ex. 4, p. 18). Moreover, Mr. Stortz believed that the Commission was well aware that the Stations

were licensed to a church, and it therefore never occurred to him that he needed to mention that knowledge of Church doctrine or theological training was necessary for certain jobs. Similarly, it did not occur to Mr. Stortz that he needed to explicitly mention the Stations' arrangement with the Concordia Seminary -- again, in his view the Commission was well aware that the Stations had a close connection to the Seminary, especially given that KFUD(AM) had originally been licensed to the Seminary. (Church Ex. 4, p. 18; see supra ¶ 11).

55. Although she was aware that the Stations late in the License Term registered concern with her about EEO requirements for religious stations (Tr. 1016-18), Marcia Cranberg, the lawyer at Arnold & Porter with day-to-day responsibility for the Stations, did not focus on the fact that KFUD(AM) had a religious program format when she reviewed the EEO Program Report which she had been sent by Mr. Stortz with the renewal application for filing with the FCC. Thus, Ms. Cranberg did not question Mr. Stortz about whether KFUD should have language in the applications to reflect the fact that there were likely to be requirements for knowledge of Lutheran doctrine for certain positions. (Church Ex. 8, p. 2; see also Church Ex. 8, p. 1).



3. The Stations' Affirmative Action Efforts

56. Over the course of the License Term, the Stations' staff averaged only 19 full-time employees.<sup>9/</sup> The Stations made 43 full-time hires during the License Term, and sought referrals for at least 26, or over 60%, of those hires.<sup>10/</sup> The Stations hired a minority female full-time sales worker for a Top Four job category position during the License Term.<sup>11/</sup> (Church Ex. 4, p. 12; Tr. 763). Of the Stations' 43 full-time hires, 25 (58.1%) were female and seven (16.3%) were minority. (Church Ex. 4, Att. 6).<sup>12/</sup> As a result, during the License Term, the Stations hired minorities at 104.5% of minority representation in the local workforce.

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<sup>9/</sup> This number is based on KFUE's annual FCC Form 395-B's. (NAACP Ex. 24; Church Ex. 10).

<sup>10/</sup> This includes seeking referrals from station employees, which is a permissible referral source. See 47 C.F.R. § 73.2080(c)(2)(iv).

<sup>11/</sup> The term "Top Four job category" as used herein has the same meaning as in FCC Form 395-B -- Officials and Managers, Professionals, Sales, and Technicians.

<sup>12/</sup> The labor force in the St. Louis MSA was 15.6% minority during the License Term. HDO, 9 FCC Rcd at 917 n.6.

a. February 1, 1983 to August 3, 1987<sup>13/</sup>

57. During the License Term, the Stations struggled financially. (Church Ex. 4, p. 6). For example, in the first half of 1983, the Stations had a \$120,383.74 operating deficit. In 1983-1984, the Stations had a deficit of almost \$150,000. In the fiscal year from July 1, 1984 to June 30, 1985, income on commercial KFYO-FM was less than \$250,000 while expenditures on the Stations exceeded \$800,000 -- large bequests to KFYO(AM) were the only factor that allowed the Stations to show a surplus. (Church Ex. 4, Att. 5, pp. 1, 2, 4). Because of these financial problems, the Stations relied on sources such as referrals by current employees to find applicants who were willing to work for jobs that paid less than the broadcast norm. (Church Ex. 4, pp. 6-7; Tr. 487). In this regard, it should be noted that the Equal Employment Opportunity Program filed by the Stations in 1983 had listed under "Recruitment," among other steps: "We encourage present employees, particularly minority and female employees to refer minority and female candidates for existing and future job openings." (NAACP Ex. 25, p. 3).<sup>14/</sup>

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<sup>13/</sup> This period runs from the beginning of the License Term until the effective date of the FCC's Report and Order amending its rules regarding Equal Employment Opportunity in MM Docket No. 85-350. Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) [hereinafter Equal Opportunity Rules for Broadcasters].

<sup>14/</sup> The NAACP's "experienced" witness at the hearing was Richard J. Miller, former owner of KRJY(FM), St. Louis. Mr. Miller executed an affidavit on February 5, 1990, in which he  
(continued...)

58. Largely through these referrals by current employees, the Stations hired 19 full-time employees between February 1, 1983 and August 3, 1987. Included among these employees were three African-American women, Ruth Clerkly,<sup>15/</sup> Helen Richardson, and Lisa Harrison, who were hired in July 1984, March 1985 and August 1985, respectively. (Church Ex. 4, p. 6; Church Ex. 4, Att. 6, pp. 1-2). Thus, over fifteen percent (15%) of the full-time hires in this period were minorities.

59. Lula Daniels, an African-American woman who served as Coordinator of Worship Programming from before the beginning of the License Term until she died on April 17, 1985 (having been earlier promoted from a secretary position by Reverend Devantier), referred Ms. Clerkly and Ms. Richardson through contacts at a local parish Church. Ms. Daniels was "part of a network of congregations and Lutherans in the community . . . who by word of mouth would identify individuals who [might] be qualified for positions at KFUD or who would alert those looking

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<sup>14/</sup>(...continued)

vouched for the accuracy of the facts in a Response to a Petition to Deny filed by the NAACP against KRJY. (Church Ex. 12; hereinafter the "KRJY Opposition"). In his KRJY Opposition, Mr. Miller stated that his station in St. Louis also relied in many cases on seeking "recommendation of employees" as well as "consulting resumes on file." (Church Ex. 12, p. 8). Mr. Miller stated that these informal means were successful in attracting minorities. (Church Ex. 12, pp. 8-9).

<sup>15/</sup> Ms. Clerkly was recommended and "considered for a management-level position at the station but unfortunately left [KFUD's] employ before [it was] able to" promote her. (Tr. 883 lines 10-15).

for positions to apply at KFUA." (Tr. 865; Church Ex. 4, Att. 6, p. 1; Church Ex. 7, p. 9; Tr. 746-49, 864-65).

60. Using these Lutheran sources and minority and non-minority staff referrals, as of January 31, 1984, the representation of minorities on the KFUA staff was 35.6% of the minority representation in the local workforce overall (35.6% of "parity"), and 42.7% of parity in the Top Four job categories.<sup>16/</sup> By January 31, 1985, the Stations were at 75.4% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. On January 31, 1986, the Stations slipped to 37.7% of parity overall and (with the death of Ms. Daniels) no longer had any African-American employees in the Top Four job categories. (Church Ex. 4, Att. 12, pp. 1-2; NAACP Ex. 24, pp. 4-21).<sup>17/</sup>

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<sup>16/</sup> The Stations used a two-week reporting period ending January 31 of each year. The first such period during the License Term was reported in the Stations' 1984 395-B.

<sup>17/</sup> During this period, the Stations employed three full-time African-American employees at the Stations who were not employed during the weeks used to complete FCC Forms 395-B; i.e., the last two weeks of January of each year. Thus, the parity analyses above underestimate the Stations' success in hiring minorities. The minority employees were: Ruth Clerkly, who was hired on September 30, 1984 and left KFUA on December 26, 1986 (did not appear in the 1984 employment report); Helen Richardson, who was hired on March 26, 1985 and left KFUA on August 31, 1985 (did not appear in any employment report); and Lisa Harrison, who was hired on August 28, 1985 and left KFUA on January 10, 1986 (did not appear in any employment report). (M.M. Bur. Ex. 6, pp. 4-5). All three left for job opportunities outside the field of broadcasting. (Church Ex. 4, Att. 7, p. 10 n.2).

61. Beginning in late 1985, the Stations began to use commercial advertising to recruit employees.<sup>18/</sup> Between September 3, 1985 and August 3, 1987, the Stations placed advertisements in general circulation periodicals for at least four of their eleven full-time hires. (Church Ex. 4, Att. 6, pp. 2-4). In September 1985, for example, the Stations advertised their Business Manager opening in the St. Louis Post Dispatch. (Church Ex. 4, Att. 6). Likewise, in August 1987, the Stations advertised in the St. Louis Post Dispatch for salespersons.<sup>19/</sup> The Stations also advertised in Broadcasting Magazine for a general manager of the AM station, a station manager of the FM, a sales manager, a Director of Audio Resources, and for an announcer on the AM station. (Church Ex. 4, pp. 11-12; see also Church Ex. 4, Att. 6, pp. 3-4). The Stations continued, however, to have their need for knowledge of Lutheran principles for certain positions. Accordingly, KFUD(AM) in particular continued to rely on Church referrals as well as employment advertising in periodicals such as the Lutheran Witness, which was widely distributed to members of Lutheran Church-Missouri Synod

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<sup>18/</sup> The Stations' policy was to state in advertisements that they were Equal Opportunity Employers. Some of the advertisements did not, however, contain this notice. Dennis Stortz testified that any omission of the notice was an inadvertent error. (Church Ex. 4, p. 12 n.3; Tr. 777-81).

<sup>19/</sup> In his KRJY Opposition, the NAACP's "experienced" witness at the hearing, Richard J. Miller, highlighted advertisements in the St. Louis Post Dispatch as a fertile source for minority recruitment. (Church Ex. 12, p. 7) (noting that weekday edition of the Post Dispatch reaches 51.2% of the St. Louis African-American population, and weekend edition reaches 59.3% of that population).

congregations, including the Church's African-American members. (Church Ex. 4, p. 12; Church Ex. 4, Atts. 7, 9; see also Tr. 750-51).

62. Beginning in January 1987, the Stations also posted all openings at the Church's International Center, whose employees were approximately 11.5% minority. (Church Ex. 4, p. 12; see also Church Ex. 4, Att. 6, pp. 3, 11).

63. Beginning no later than 1987, the Stations also used the Broadcast Center in St. Louis to recruit for certain positions. The Broadcast Center is the only broadcast trade school in St. Louis and was approximately 7% minority (5.9% Black) in 1989. (Church Ex. 4, pp. 14-15 n.5; Tr. 613-14).<sup>20/</sup>

64. In spite of these efforts, the Stations were unable to attract new African-American employees in 1986 or in the period January 1 to August 3, 1987. As of the pay period ending January 31, 1987, the Stations no longer had any African-American employees. (Church Ex. 4, Att. 6; Church Ex. 4, Att. 12, p. 3; NAACP Ex. 24, pp. 22-29). This resulted from the death of Ms. Daniels in April 1985, the departure of Ms. Richardson in August 1985, the departure of Ms. Harrison in January 1986, and the departure of Ms. Clerkly in December 1986. (Church Ex. 7, p. 9; M.M. Bur. Ex. 6, pp. 6-7). There is no evidence that any of these persons complained that they were discriminated against by

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<sup>20/</sup> The "experienced" witness who testified for the NAACP, Richard Miller, stressed in the KRJY Opposition that the Broadcast Center was a "second major source" (i.e., other than internships) of minority referrals for his station in the St. Louis market. (Church Ex. 12, p. 7).

the Stations or that their departures were in any way caused by discrimination.

65. During the period of the License Term prior to August 3, 1987, the Stations' communications counsel sent to various general managers at KFUD, as well as to other broadcast clients, several letters relating to the Commission's EEO policies.<sup>21/</sup> Certain of these letters related to the Commission's EEO reporting procedures. For example, in December 1985, one of Arnold & Porter's advisories informed its clients about an FCC rulemaking concerning EEO reporting procedures. (Church Ex. 8, p. 3; Church Ex. 8, Att. 1). Another letter was a very brief note enclosing information from the NAB regarding its employment clearinghouse for minority and female hiring. (NAACP Ex. 42). In June 1987, the law firm sent to clients, including KFUD, copies of the full text of the Report and Order released on June 12 of that year, and effective on August 3, 1987. In its cover letter, the subjects which were explicitly described related to new EEO reporting requirements and forms. The law firm explained that Appendix B of the Report and Order outlined in detail the EEO program which every station was required to adopt, but made no attempt to summarize those requirements. Instead, Arnold & Porter referenced the appropriate pages, and urged the clients

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<sup>21/</sup> The EEO letters were included among scores if not hundreds of letters over the years notifying Arnold & Porter's clients of regulatory developments at the Commission. In general, these letters were sent to all of the firm's broadcast clients as a way of keeping them up-to-date on developments. (Church Ex. 8, pp. 2-3).

themselves to review the provisions. (Church Ex. 8, p. 3; Church Ex. 8, Att. 2).

66. In the view of the Stations' long time Director of Operations, Dennis Stortz, all of Arnold & Porter's letters appeared to be form letters, presumably sent to all of the law firm's FCC clients. Mr. Stortz believed that most dealt with changes in the forms to be used when making EEO filings, rather than substantive issues. Nothing in them appeared to Mr. Stortz to alert the Stations to any particular deficiency they had or to deal with their special needs regarding religious qualifications for certain jobs. (Church Ex. 4, p. 13).<sup>22/</sup>

**b. August 3, 1987 to February 1, 1990**

67. For approximately the first year after the effective date of the FCC's revised EEO rules (i.e., until September 1, 1988), the Stations continued to principally rely on employee referrals, resumes on file, Lutheran publications, and advertisements in Broadcasting in making eight full-time hires.<sup>23/</sup> (Church Ex. 4, Att. 6, pp. 4-5). As of the pay

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<sup>22/</sup> According to Ms. Cranberg, Arnold & Porter had not become involved in matters relating to specific EEO issues peculiar to the Stations prior to late 1988. (Church Ex. 8, p. 4). Ms. Cranberg testified that not until depositions were held in this case had she ever met in person with Mr. Stortz or anyone else employed by the Church or by KFUE. Moreover, she has never visited the Stations. (Church Ex. 8, pp. 4-5).

<sup>23/</sup> The Stations continued to struggle financially in this period and indeed throughout the License Term. In the fiscal year ending June 30, 1989, KFUE-FM's expenses exceeded its revenues by \$283,658. The Stations' total  
(continued...)



period ending January 31, 1988, the Stations had no minority employees. (Church Ex. 4, Att. 12, p. 3; NAACP Ex. 24, pp. 30-31). However, the FM station made a concerted effort to hire an African-American or Hispanic salesperson and did in fact hire Caridad Perez, a Hispanic female, in March 1988. (Church Ex. 4, p. 12; see also Tr. 763).

68. In initiating the process of hiring sales workers during the period from August 1987 to January 1989, FM general manager Thomas Lauher contacted the St. Louis Broadcast Center<sup>24/</sup> and placed advertisements in various publications including Broadcasting and the St. Louis Post Dispatch. (Church Ex. 6, p. 1). Although Mr. Lauher did not recall being given any instructions when he was first hired that minorities should be given a preference (Tr. 134), he recalled referrals of applicants from the St. Louis Broadcast Center and noted that he had talked to a variety of candidates in an effort to hire a variety of people, including minorities. (Church Ex. 6, p. 1). From the beginning of his term as general manager in August 1987, Mr.

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<sup>23/</sup>(...continued)

operating loss was cut in half by the receipt of \$441,598 in legacies and bequests. If these legacies and bequests are removed, the Stations' operating deficit was almost \$600,000. (Church Ex. 4, Att. 5, p. 43). The fiscal year ending 1988 was similar -- KFUD(FM) had an operating loss of \$308,825. The Stations' total loss was only \$173,851 because of \$341,094 in bequests and legacies. (Church Ex. 4, Att. 5, p. 33).

<sup>24/</sup> In Mr. Lauher's view, the Broadcast Center was the best of its kind in training people to become broadcasters and was an Equal Opportunity Employment source. (Tr. 141). (See Note 20, supra, for the similar views of the NAACP's "experienced" witness).